No. 10,333

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor, and Mount Gaines Mining Company (a corporation), Debtor,
Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,
Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Authorities Cited

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions the Court for a rehearing in this cause for the following reasons:

In the opening brief of appellant herein, the appellant stated that there were only two questions to be decided:

> "1. Was the option, embodied in the lease, exercised by the notice of May 25, 1937?"
>
> "2. If the option was exercised was the appellant entitled to have 75% of the royalties that had been paid applied upon the purchase price of the property and on the first installment?"
>
> (Opening Brief, pages 13-14.)

That the notice dated May 25, 1937, was an exercise of the option by reason of the statement contained in the notice:

> "hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement"

Then followed a request in that notice for the application of 75% of the rents and royalties paid be applied upon the first installment of the purchase price. That notice:

> "hereby elects to exercise, and does exercise, the option to purchase * * *"

was the exercise and created a liability against the Mount Gaines Mining Company to pay the owners $50,000.00 and had the effect of changing the option from an option to purchase into an executory contract of sale and purchase binding the Mount Gaines Mining Company to pay $50,000.00 on the purchase price and the owners were bound to convey the property on such payment. The relationship between the parties was

changed. Assuming the liability to pay $50,000.00 made the Mount Gaines Mining Company the equitable owner of the three-fourths interest, and entitled to the beneficial interest of the three-fourths interest.

> *Pomeroy's Equity Jurisprudence,* Fourth Edition, Section 368, page 685;
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> *Smith v. Bangham,* 156 Cal., page 363;
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> *Horgan, et al. v. Russell,* 43 L. R. A. (N. S.), page 1150;
>
> *Turner v. McCormick,* 67 L. R. A., page 853;
>
> *Johnson v. Trippe,* 33 Fed., page 740;
>
> *Pollock, et al. v. Brookover,* 6 L. R. A. (N. S.), page 403.

"The vendee is looked upon and treated as owner of the land; an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee to whom all the beneficial interest has passed."

> *Pomeroy on Contracts, Specific Performance,* Second Edition, Section 314, page 400.

The lease and option was merged into the executory contract of sale and purchase and, except for the one-fourth interest retained by the owners, the lease and option was terminated. All payments thereafter made by the Mount Gaines Mining Company, from the sale of ores or from any other source, were payments upon the purchase price and not either rentals or royalties.

If the authorities cited are correct, that the exercise of the option made the optionee the equitable owner

of the three-fourths interest, there could be no lease, nor rents, nor royalties. There was nothing that the owners would apply from time to time on the purchase price. The Court's decision that the rents and royalties paid prior to the exercise of the option, while the lease and option was in force, were not intended to be applied upon the purchase price by reason of the language contained in the option:

> "and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned"

had the effect of abrogating the entire provision agreeing to apply 75% of the rents and royalties, paid under the lease and option, upon the purchase price. That clause, as a matter of fact, is absolutely superfluous under the present interpretation of the option, for it could have been left out entirely and the law would have compelled the application of all payments paid on the purchase price to be applied thereon.

The clause in the option:

> "It is further agreed that 75% of the royalty and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest."

was a right given to the optionee in consideration of the covenants and agreements contained in the lease and option and granted to the optionee a contingent interest in that fund that would become vested in the optionee when the optionee assumed the liability to pay $50,000.00 and purchased the mining property.

There is no ambiguity and it is clear cut and as the Court stated in its opinion:

> "Torn from its context this language might well be deemed conclusive."

That clause is the promise upon the part of the optionors to apply 75% of the rents and royalty payments *paid under this lease.* The entire clause with reference to royalties and rentals shows that the purpose of that clause, and the intention of the parties, was to apply 75% of the royalties and rentals upon the purchase price and all rules of construction require that the intention of the parties shall be given full effect, and a construction be given it that will give effect to the intention. If there was any ambiguity it was an ambiguity created by the optionors as appears from the Court's opinion by the statement in that clause:

> "and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the 'first installment herein mentioned.' The reference to the 'first installment' can only be to the $10,000 cash payment required to be made at the time of notice of exercising the option. If this language is to be given any effect, it must mean, at the least, that the credits of 75% of the rents and royalties were to be made only upon the subsequent installments and not on the down payment."

The Court further stated:

> "Effect must also be given the language found elsewhere in the agreement, namely, that the royalty payments were 'to be considered as a

rental only'. Taking this somewhat ambiguous contract by its four corners and attempting to construe it reasonably, it would appear, indeed, that rentals or royalties paid prior to the exercise of the option were not to be credited on any of the installments of the purchase price, either the first or the later ones, but were to belong to the lessor absolutely."

By the langage of that part of the option which the Court seems to have given slight attention:

> "the royalties and rental payments *paid under this lease* shall be applied and credited upon the purchase price * * *"

there is no limitation in that clause and if there be any ambiguity, it is to be remembered that the whole of that portion of the option with reference to the royalties is a promise upon the part of the optionors to apply the royalties upon the purchase price.

> "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> *Cal. C. C.,* Section 1636.

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."
>
> *Cal. C. C.,* Section 1649.

> "When the terms of an agreement have been intended in a different sense by the different parties

to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

C. C. P., Section 1864.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

Cal. C. C., Section 1654.

As heretofore set out in this petition, that if the exercise of the option made the optionee the equitable owner of the property and of the beneficial interest and the optionor was merely a trustee of the title, there could be no rents nor royalties to be paid to the owner but all payments made thereafter were payments upon the debt incurred in the purchase of the property, or, as usually stated, upon the executory contract to purchase the property.

In that view the only rents and royalties that could be applied upon the purchase price were rents and royalties paid prior to the exercise of the option.

"Particular clauses of a contract are subordinate to its general intent."

Cal. C. C., Section 1650.

The construction given by the lower Court and approved by this Court destroys the whole of the promise to apply the royalties and rentals upon the purchase price and that construction is contrary to the provisions of the California statutes cited and particularly *Cal. C. C.,* Section 1654:

> "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party;"

If we take the construction given to the option by the lower Court and adopted by this Court, that the $10,000.00 must be paid in cash at the time of giving notice to exercise the option and that the option would not be exercised unless such $10,000.00 was paid in cash, we still would not be the equitable owner of the property and we would have to continue to pay rents and royalties and those rents or royalties would be applied upon the purchase price. A construction of that kind is contrary to all of the authorities heretofore cited in relation to the effect to be given to the exercise of an option. The Mount Gaines Mining Company would still have to pay rents and royalties, and the lease would continue to be in force on the three-fourths interest. The full effect of that construction is to release the optionor from applying

> "75% of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of said three-fourths interest in said property herein provided to be sold."

and if the authorities heretofore cited be correct, that the option be exercised and we become the owner, there are no rents paid upon the three-fourths interest after the exercise, but all payments are payments upon the purchase price. The construction given has released the optionor from applying any royalties or rentals upon the purchase price and simply renders the provisions quoted to be void.

> "An interpretation which gives effect is preferred to one which makes void."
>
> *Cal. C. C.,* Section 3541;
>
> *Toland v. Toland,* 123 Cal., page 140;
>
> *Sample v. Fresno Flume etc. Co.,* 129 Cal., page 223.

After the option was exercised, three-fourths of all the ores sold was the property of the Mount Gaines Mining Company and one-fourth was subject to the terms of the lease. The owners of the one-fourth interest were entitled to receive as rents and royalties 10% of one-fourth of the proceeds; the 75% of the ores sold was not subject to rents or royalties but came to the Mount Gaines Mining Company from the sale of its own property.

If the above view is correct then the demand contained in the notice exercising the option, to apply 75% of the royalties theretofore paid, should have been complied with. The contingent interest owned by the optionee, in the royalties theretofore paid, became vested and the 75% belonged to the optionee to be applied upon the purchase price, and was one which

was enforceable in law and equity. The application of that 75% would have satisfied the first installment and part of the second installment.

Wherefore the appellant prays this Honorable Court that a rehearing may be granted in order that the conclusions arrived at and stated in the Opinion herein may be re-examined in the light of the foregoing authorities and statement, and thereupon that the decision of this Court, entered on the 24th day of June, 1943, be set aside and a mandate returned to the District Court directing it to set aside the order dismissing appellant's petition.

MOTION FOR STAY OF MANDATE.

In the event that this Petition for a Rehearing is denied, the appellant respectfully moves the Court for a stay of mandate, sufficient in length of time to permit him to apply to the Supreme Court of the United States for a Writ of Certiorari, to the end that this cause may be reviewed and determined by said Court.

Dated, Reno, Nevada,
July 19, 1943.

Respectfully submitted,
JAMES T. BOYD,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Reno, Nevada,
July 19, 1943.

James T. Boyd,
Counsel for Appellant and Petitioner.